DEBT AND COMMUNITY PROPERTY IN NEVADA

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I. DEFINITIONS

Nevada law does not have an explicit section of "definitions" of either separate debt or community debt. However, some other code provisions indicate the definitions that the drafters had in mind, at least to some extent.

NRS 123.050 provides:

> Neither the separate property of a spouse nor his share of the community property is liable for the debts of the other spouse contracted before the marriage.

By implication, this provision appears to create the categories of "separate debt" and "community debt."

In a relatively recent case, the Nevada Supreme Court stated in dicta that it considered this statute to be in accord with federal tax law and California Family Code Section 910, in that half of a spouse's post-marital earnings are liable for that spouse's premarital debts.[1] The other half belongs to the other spouse and is not available for those debts.

II. DISTRIBUTION OF DEBT UPON DIVORCE

A. Correspondence with community property statute

In 1993, the Nevada legislature changed the Nevada community property scheme from one of presumptive "equitable distribution" to one of presumptive equal distribution.[2] The statute itself says nothing about division or assignment of debts. In the bar, however, there was a perception before the statutory amendment that the duty of the courts as to debts was similar to that regarding property -- to be "equitable" in its allocation. There does not appear to be any appellate authority on the subject from that era.

Quite recently, however, the Nevada Supreme Court has by implication approved that common perception. In an appeal decided after the conversion to presumptive equal division of property, the court reversed a district court decision that had required the husband to purchase a life

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[1] *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

[2] NRS 125.150(1)(b).

insurance policy without imposing a corresponding duty on the wife. The appellate court ruled that the trial court's decree had "constituted an unequal distribution of debt."[3] The holding, while oblique, would appear to direct trial courts to effect an *equal* distribution of debt when they can do so.

Property acquired after marriage has significant protection from debts existing prior to that marriage. As noted above, NRS 123.050 provides:

> Neither the separate property of a spouse nor his share of the community property is liable for the debts of the other spouse contracted before the marriage.

Some courts have not honored this protection of the spousal share of a worker's wages. In 1962, a federal court held that the statute was no bar to a collection action by the husband's prior spouse against the community property the husband shared with his new wife, at least to the extent of his earnings.[4] In 1992, however, the Nevada Supreme Court refused to impute half of a second spouse's income to a payor of child support in setting the amount of child support due.[5]

It is uncertain how far this consideration for the rights of a second spouse will go, however, since the Court has also expressed at least some willingness to invade legal protections for second spouses when necessary to provide support to children of a first marriage.[6]

The characterization of the property may be determinative of any connected to the property. The Nevada Supreme Court has ruled that where a trial court finds that the property at issue is community property, it implies that debt securing it is community debt.[7]

B. Interrelationship with property distribution or other awards

There is no explicit relation of debt allocation and community property distributions to the spouses. The Nevada statutes do not mandate any particular order of decision among child support, spousal support, property division, or debt allocation. This has led to a certain amount of confusion as judges attempt to achieve equity through a "holistic" approach to deciding all issues in the case.

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[3] *Wolff v. Wolff*, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 163, Dec. 20, 1996).

[4] *Greear v. Greear*, 303 F.2d 893 (___ Cir. 1962).

[5] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992); *see also Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

[6] In *Phillips v. Morrow*, 104 Nev. 384, 760 P.2d 115 (1988), the Court permitted invasion of the homestead of now-divorcing second spouse to satisfy child support arrearage judgment recorded by earlier ex-wife.

[7] *Fuller v. Fuller*, 106 Nev. 404, 793 P.2d 1334 (1990).

The Nevada Supreme Court has opined that where a party does ***not*** pay the debts that were supposed to be paid, that party is not entitled to the property share that was awarded based on anticipation of such payment.[8] The Court has likewise allowed the reopening of alimony to the party to whom a debt fell because the other party was supposed to pay that debt but failed to do so.[9]

What is lacking, however, is any clear guidance as to which party should have been allocated what debt to begin with.

C. Other factors for debt distribution

The Nevada Supreme Court has indicated that debt allocation may be made in accordance with a lower court's conclusion of which party will have the ability to pay it. In *Malmquist v. Malmquist*,[10] the Court awarded the ***entire*** community debt to the party with the apparently higher future income.

D. Modifiability and enforcement of debt divisions

There is no authority in Nevada for the proposition that a division of debt in divorce may be modified for any reason. It would be possible to construct several logical reasons to allow such modifications, such as changed circumstances during the anticipated term of debt repayment. The case law, however, appears to presume that the debt terms set out in the decree are absolute, and that other terms, such as alimony,[11] or property division,[12] will be amended to enforce the debt division. While there is no significant appellate authority on the subject, proceedings in the lower courts to enforce debt payment terms by less drastic means (primarily, contempt sanctions) are common.

There have not been, to date, any holdings on the permissibility of tort claims (*e.g.*, for credit impairment, or even intentional infliction of emotional distress) by the injured spouse against the former spouse who defaulted on the debt. The Nevada Supreme Court has indicated that when a party hides or eliminates community property, an unequal distribution of the remaining property is appropriate. Perhaps a claim sounding in tort, could be brought for "wrongful debt" analogized to waste of community property; perhaps a contract claim based on a property settlement agreement incorporating a debt division could be brought. Secure authority for such claims does not appear to exist at this time.

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[8] *Allen v. Allen*, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 149, Oct. 22, 1996), discussed *infra* under bankruptcy.

[9] *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992).

[10] 106 Nev. 231, 792 P.2d 372 (1990).

[11] *See Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992).

[12] *Allen v. Allen*, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 149, Oct. 22, 1996).

E. Impact of failure to assign debt upon divorce

Nevada has, more or less, rejoined the rest of the community property states in providing that property left undistributed by the court upon divorce remains the property of the parties as tenants in common.[13]

Presumably, in an appropriate case, a trial court could likewise find the parties to be "debtors in common" of "omitted debt." At the moment, however, there appears to be no clear authority indicating what a party or court should do when one party discovers an obligation that was not assigned in the divorce proceedings.

III. TEMPORARY (*PENDENTE LITE*) VS. "PERMANENT" DEBT DIVISION

There is some statutory authority for temporary debt division in Nevada, although it is vague. NRS 125.040 states in part:

> 1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one of more of the following:
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> (a) To provide temporary maintenance for the other party;
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> (b) To provide temporary support for children of the parties; or
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> (c) To enable the other party to carry on or defend such suit.
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> 2. The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this section. Such orders shall be made by the court only after taking into consideration the financial situation of each of the parties.
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> . . . .

Subsection (2) is so vague that it could probably be interpreted as reaching any subject matter relating to either property or debt. While the statute does not use the term "debt" it would not seem promising to challenge an order essentially directing application of "property" to debt service, since debts are obviously part of the "financial situation of each of the parties" that the courts are directed to consider.

There is no significant case law on the parameters of the district court's discretion in awarding temporary alimony. Probably the closest thing to recent guidance on the subject came by implication in a recent case involving interpretation of a premarital agreement that called for a

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[13] *See Gramanz v. Gramanz*, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 1, Jan. 3, 1997); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990); M. Willick, *Partition of Omitted Assets after Amie; Nevada Comes (Almost) Full Circle*, 6 Nev. Fam. L. Rep., Spring 1992, at 8.

limited sum of alimony. In *Dimick v. Dimick*,[14] the Nevada Supreme Court interpreted a particularly poorly-drafted prenuptial agreement, entered into the day before the parties' wedding, which provided, among other things, that in the event of divorce husband would pay wife $200.00 in spousal support for each month that they had been married.

The prenuptial agreement required the husband to pay $200.00 per month into a trust account, which he never did during the marriage. During the pendency of the case, the husband was ordered to pay the monthly mortgage expenses for the home occupied by the wife. The Court ruled that the husband's temporary spousal support obligation "is separate entirely" from the obligation to pay post-divorce alimony intended "to provide additional spousal support to [the wife] in the event of dissolution of marriage." Thus, the husband was not allowed to credit the mortgage payments against his post-divorce support obligation.

Since the Nevada Supreme Court has given some guidance to the lower courts as to how to arrive at a sum for post-divorce alimony, the implication is that those courts are to be doing something ***else*** when determining temporary support. The apparently-universal-but-essentially-foundationless standard appears to be a balancing, irrespective of fault issues, between the need of the spouse seeking support and the ability to pay of the spouse from whom support is sought.

It is worth mentioning at this point that debts often play a significant, if ill-defined, role in this balancing act, since even the party with greater income cannot fairly be made to pay any significant sum of temporary spousal support if that spouse is also servicing the past and current debts of the parties; in such instances, the other spouse is already receiving "support" to some extent by being relieved of payments that the spouse would otherwise be paying. Of course, in the usual case, the parties are living just before separation slightly beyond their means, making it impossible for both to live and simultaneously continuing to service existing debt. In such cases, the existing debt is usually what is made to yield, even if it spells bankruptcy in the long run.

IV. THIRD PARTY MATTERS

A. Third party creditors of community debt vs. community property and separate property

There are few restrictions on the ability of a spouse to incur "community debt" which creditors can enforce. In 1975, Nevada formally adopted joint management and control of community property. The statute, NRS 123.230, provides in part:

> . . . .
> 3. Neither spouse may . . . encumber the community real property unless both join in the execution of the deed or other instrument by which the real property is . . . encumbered, and the deed or other instrument must be acknowledged by both.

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[14] 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 56, Apr. 30, 1996).

> 4. Neither spouse may purchase or contract to purchase community real property unless both join in the transaction of purchase or in the execution of the contract to purchase.
> . . . .
> 6. Neither spouse may acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of a business where both spouses participate in its management without the consent of the other. In only one spouse participates in management, he may, in the ordinary course of business, acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of the business without the consent of the nonparticipating spouse.

The Nevada Supreme Court has expressed willingness to protect spouses from unwitting debts encumbering interests in reap property. Where a husband attempted to encumber community real property, and the wife, knowing nothing of that transaction, signed a property settlement agreement in their divorce granting her the realty "subject to encumbrances of record," she did not "ratify" the transaction, and it was set aside as invalid.

Except for real estate and jointly-managed businesses, it appears that both spouses have free reign to incur debt for which the community is responsible. It also appears clear that the creditors of such community debt are unaffected by anything in a divorce decree from pursuing either of the parties for repayment.[15]

B. Third party creditors of separate debt v. community property and separate property

Things are less cheery for creditors pursuing premarital debt, or a debt incurred by only one of the spouses after marriage. As indicated above, there appear to be few exceptions to the statutory security of NRS 123.050 of each spouse to half of the community property, so half the wages of the spouse who had the premarital debt are unavailable at the moment they are earned.[16]

Nevada does, however, recognize "the doctrine of necessaries." NRS 123.090 provides:

> If the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The separate property of the husband is liable for the cost of such necessities if the community property of the spouses is not sufficient to satisfy such debt.

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[15] *See Marine Midland Bank v. Monroe*, 104 Nev. 307, 756 P.2d 1193 (1988) (bank is free to pursue wife for delinquent joint credit card debt despite divorce court's order for husband to pay such debt).

[16] *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994); *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992); *contra*, *Phillips v. Morrow*, 104 Nev. 384, 760 P.2d 115 (1988).

The only appellate case discussing this aged statute (it was passed in 1873) indicates that the terms "necessary for her support" and "necessities" will be construed somewhat closely. In *Ferreira v. P.C.H. Inc.*,[17] a husband was found not liable for his wife's car rental for "failure to provide adequately for her support" where there was no conversion of the automobile and no proof of community purpose in its rental.

The (double) standards of the day are highlighted by looking at two other statutes also originating in 1873. NRS 123.110 states a different standard for when husbands must be supported by wives:

> The wife must support the husband out of her separate property when he has no separate property and they have no community property and he, from infirmity, is not able or competent to support himself.

The obvious implication is that men, but not women, have an implied duty of self-support when they are physically capable of doing so.

Even so, the statute has been interpreted. The statute was found to create a duty of support that ran to the benefit of creditors who supplied necessaries of life to an infirm, impecunious husband. A hospital was therefore able to reach the separate property of a woman whose spouse had died at the hospital leaving no community or separate property.[18]

Why the spouse requiring assistance is in need may be relevant. NRS 123.100 provides:

> A husband or wife abandoned by his spouse is not liable for the support of the abandoning spouse until such spouse offers to return unless the misconduct of the husband or wife justified the abandonment.

This 1873 enactment was construed only once, in 1929, when the Nevada Supreme Court held that a wife should not have been granted a divorce on the ground of the failure of her husband to support her, when she had ordered him from the home and refused to permit him to live with her, since she had "waived her right to support" by doing so.[19]

The continuing vitality of either the statute or the case interpreting it are questionable in the age of no-fault divorce. Since the statutory ground for divorce of abandonment has been eliminated, a different statute (passed in 1861 but amended most recently in 1975) grants the authority to award temporary support "in its discretion,"[20] and case law has established a primarily *economic* test for

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[17] 105 Nev. 305, 774 P.2d 1041 (1989).

[18] *Swogger v. Sunrise Hosp., Inc.*, 88 Nev. 300, 496 P.2d 751 (1972).

[19] *Smith v. Smith*, 51 Nev. 271, 274 P. 9 (1929).

[20] NRS 125.040.

the propriety of alimony,[21] it is not clear that one spouse accused of abandoning the other (or proved to have done so) is ineligible for either temporary spousal support or permanent alimony. Thus, it is not clear that the doctrine of necessaries would *not* apply to a spouse who had abandoned, or been abandoned by, his or her spouse.

V. BANKRUPTCY IMPLICATIONS

Oddly, there have been a substantial number of bankruptcy cases relating to debt allocation and responsibility. Some have been discussed above and will only briefly be recounted here.

When one spouse files for a chapter seven bankruptcy, the filing protects the other. In *Norwest Financial v. Lawver*,[22] a husband and wife had jointly signed a promissory note to Norwest Financial, secured by household goods, and providing for liability of both. Only the husband filed for bankruptcy, and turned over to bankruptcy trustee all his separate property and all of the couple's non-exempt community property per 11 U.S.C. § 541(a)(2). In addition to filing a creditor's claim, Norwest sought relief against the wife for unpaid balance on the note. Summary judgment was granted to the wife, and the Nevada Supreme Court upheld the ruling, holding that 11 U.S.C. § 524(a)(3) creates an injunction against the commencement of an action against a debtor's spouse to collect community property acquired after the commencement of the debtor's bankruptcy. Since community property passes into the bankruptcy estate of the filing spouse, in community property states there is no need for both spouses to file unless the nondebtor spouse has substantial separate debt. The only question is whether the debt is "separate" or "community" as to the non-debtor spouse, which depends upon intent of lender in granting the loan. Here, clearly, the loan was to the community, so the wife's wages, after husband's bankruptcy filing, were immune from attachment by lender.

It should be noted that this case did not involve a divorce, and it would appear that there are open questions as to what would have happened if the couple had divorced at some stage of the bankruptcy proceedings.

In *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992), an August, 1988 divorce decree ordered child support and for the husband to pay two Visa accounts. He filed bankruptcy in September, and had them discharged in April, 1989. The wife filed a motion for spousal support; after an evidentiary hearing, the lower court found that the debt payment terms were "characterized as being in the nature of alimony, maintenance and support" and so ordered support in an amount sufficient to repay wife for credit debts now falling to her. On appeal, the Nevada Supreme Court affirmed that in this case the "hold harmless" provisions qualified as maintenance or support, since court found that without it the "spouse would be inadequately supported." The husband's assumption of debt was tied to an agreement for lower child support, and when he breached the

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[21] *See Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994); *Gardner v. Gardner*, 110 Nev.1053, 881 P.2d 645 (1994).

[22] 109 Nev. 242, 849 P.2d 324 (1993).

agreement, he left her inadequately supported. While discharge was proper, he could not discharge obligations arising out of decree.

The appellate court apparently did not address timeliness question of how wife could file a motion for alimony nearly a year after divorce was final (local rules permit only six months to modify a decree under NRCP 60(b)), but there may have been additional procedural facts not recited in the opinion.

In *Allen v. Allen*,[23] the husband and wife entered into an oral property settlement; the wife waived child support, and the husband agreed to pay certain debts and pay $16,250.00 to the wife "to equalize the division of community property." The agreement was made during a "settlement conference" held by the district court judge, but was not reduced to writing for a year, when the court entered a divorce decree "nunc pro tunc" adopting the agreement. In the interim, the husband filed bankruptcy, and was "released" from most of the financial obligations. The wife claimed that the husband used the bankruptcy to defraud her out of her share of the community property and that because of the bankruptcy there was a failure to equalize the division of community property as intended. The wife moved to set aside the decree, which was denied by the district court as "barred by federal law."

The Supreme Court, noting that the district court knew all these facts, expressed no understanding of why the district court would enter the decree in the first place, but held that in any event, it was error to refuse to set it aside. Noting its holding in *Siragusa v. Siragusa*,[24] the Court again held that the lower court could consider the effect of the husband's bankruptcy upon the community and the rights of the parties, "but this is not to say the state court would be interfering in any way with the bankruptcy court's decree." The Court expressly rejected the husband's assertion that the wife's fraud claim was waived under 11 U.S.C. § 524 because she failed to file a complaint in the bankruptcy action.

Finally, the Court concluded that even aside from the question of fraud, the decree entered was inherently unfair and should be set aside: "Under no circumstances, bankruptcy or no bankruptcy, should one party to a divorce be allowed to take all of the benefits of the divorce settlement and leave the other party at the disadvantage suffered by the wife in the present case."

Although some of these comments appear to be *dicta*, *Allen* provides authority for the proposition that whenever a bankruptcy has "an effect upon the community and the rights of the parties," a motion may be entertained to rectify that effect.

It appears that an intervening bankruptcy has no effect on the liability of the non-custodian for child support arrears, or the ability of the custodian to collect them. In a case styled *In Re Anders*, No. BK-S-91-24783-LBR (Bk. Ct., D. Nev., Mar. 10, 1993), the court held that a former wife who declares chapter seven bankruptcy could retain a child support arrears judgment (granted after she filed bankruptcy) despite the bankruptcy. The court held that child support "is a property

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[23] 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 149, Oct. 22, 1996).

[24] 108 Nev. 987, 843 P.2d 807 (1992).

interest belonging to the child" and the custodian "merely has a right to enforce the child's property interest." The 11 U.S.C. § 541(b) exception from the property of the bankruptcy estate for "powers which are exercisable solely for the benefit of another" apply to child support by analogy.

VI. PROPOSALS FOR MODEL DEBT DIVISION

Again, there is nothing "on the table" in Nevada on this subject. Given the change to presumptive equal distribution of property, however, and the language from *Wolff* noted above, it would appear that the evolving rule in Nevada is for presumptive equal allocation of responsibility for debts, along with property, with spousal support to be used as the mechanism for allowing such debt service.

On the other hand, there is really no telling what the appellate court would do in a case where the facts clearly supported a disproportionate allocation of debt. Given the decision in *Lofgren v. Lofgren*,[25] ("if community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property"), it should be expected that such supported distributions will be upheld, and the decision in *Malmquist*[26] indicates that the courts should be looking beyond "equality" to ability to pay.

Any proposed model provision for debt division must attempt to take into account the procedural order for considering child support, alimony, and the role of whatever division of property is made, when allocating debts. The same "bottom line" can be reached in different ways by manipulation of these components, but it would make the law clearest, and therefore be least likely to produce errors, if a similar analytical order was followed from case to case.

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[25] 112 Nev. ___, 926 P.2d 296 (Adv. Opn. No. 156, Nov. 7, 1996).

[26] 106 Nev. 231, 792 P.2d 372 (1990).